

# IS NATURAL LAW THEORY OF ANY USE IN CONSTITUTIONAL INTERPRETATION?

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## I. INTRODUCTION

Debate over the methodology of constitutional adjudication has in recent years been vigorous.<sup>1</sup> Whether that debate has been fruitful is, however, open to serious doubt.<sup>2</sup> Particularly within, as Professor Robin West has described it, our "fractured, relativist, nihilist, minimally pluralist moral climate,"<sup>3</sup> it is not surprising that some of the most popular approaches to constitutional interpretation tend to ratify, as much as they definitively resolve, conflicts in interpretive methodologies.<sup>4</sup> When we add in the academic bias in favor of methodological novelty, as against mere subscription to the methodologically familiar, prospects for reaching consensus on constitutional methodology become even more remote.

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1. For a concise summary of some of the highlights, see Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085 (1989).

2. See, e.g., David L. Faigman, *Madisonian Balancing: A Theory of Constitutional Adjudication*, 88 NW. U. L. REV. 641, 643 (1994) ("[t]oday, constitutional adjudication is in a state of disarray"); Michael J. Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation,"* 58 S. CAL. L. REV. 551, 588 (1985) ("debate in constitutional theory seems interminable").

3. Robin L. West, *Constitutional Scepticism*, 72 B.U. L. REV. 765, 771 (1992) (emphasis deleted). See also Sotirios A. Barber, *Whither Moral Realism in Constitutional Theory? A Reply to Professor McConnell*, 64 CHI.-KENT L. REV. 111, 111 (1988) (moral skepticism as "entrenched academic orthodoxy").

4. See, e.g., Richard H. Fallon, *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1189-90 (1987) (legitimizing appeals to constitutional text, original intent, purposes, precedent, and to value-based or policy arguments); Perry, *supra* note 2, at 552 (referring to, if not endorsing, appeals to text, ratifier morality, precedent, current public values, and the individual judge's own values); Robert C. Post, *Theories of Constitutional Interpretation*, 30 REPRESENTATIONS 13, 29-32 (1990).

Now, if different interpretive methodologies actually led systematically and consistently to different substantive adjudicative outcomes, as some scholars seem to imagine,<sup>5</sup> any academic consensus on substantive constitutional issues might lead toward consensus on the associated interpretive methodology. Whether there is any such relationship between interpretive method and substantive adjudicative outcomes is, however, also doubtful. This essay will focus on the special, but unusually interesting, case of natural law methodology in constitutional adjudication. As we will see, otherwise plausible natural law theories tend to be in any number of respects quite indeterminate with regard to constitutional adjudicative outcomes, and more indeterminate than some available non-natural law-based alternative theories of constitutional interpretation. But as we shall also conclude, in at least one crucial respect, the use of natural law interpretive methodologies in constitutional adjudication and elsewhere is of distinct moral value.

## II. NATURAL LAW AND THE INDETERMINACY PROBLEM

There are many ways of thinking about the idea of natural law. This essay will not settle upon a detailed definition of natural law. Instead, we will merely associate natural law with the familiar idea of the existence of some degree of objectivity in ethics, in a sense to be roughed out below.<sup>6</sup> The problem of the multiple indeterminacies of natural law will be illustrated with references to the work of central natural law theorists, including that of Thomas Aquinas as well as more modern writers.

This is not to suggest that ancient, medieval, colonial and contemporary natural law theorists are mutually interchangeable and like-minded on all relevant issues. The existence of some such significant differences among natural lawyers seems clear.<sup>7</sup> But it is for our purposes inaccurate to suggest, for example, that the medieval natural law of Aquinas emphasized objectivity, whereas the Revolutionary natural lawyers emphasized the merely subjective and volitional status

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5. See, e.g., Richard A. Epstein, *A Common Lawyer Looks at Constitutional Interpretation*, 72 B.U. L. REV. 699, 699 (1992) ("[t]ake one view of [constitutional] interpretation, and affirmative action is forbidden; take another, and it is required; take a third, and it is allowed").

6. See *infra* notes 72-77 and accompanying text.

7. See, e.g., LEO STRAUSS, *NATURAL RIGHT AND HISTORY* (1953); Raoul Berger, *Natural Law and Judicial Review: Reflections of an Earthbound Lawyer*, 61 U. CIN. L. REV. 5, 11-12 (1992); Walter Berns, *Foreword: Natural Law, Natural Rights*, 61 U. CIN. L. REV. 1, 2 (1992).

of moral claims.<sup>8</sup> And while John Locke, for example, may on some but not all readings be more rights-oriented than Aquinas,<sup>9</sup> even here, the distinction should not be overdrawn. There is no reason not to cite Aquinas for a derived or implied right to welfare or to life<sup>10</sup> or for a right to acquire and retain property,<sup>11</sup> as much as John Locke. One could reasonably maintain that Aquinas, along with a number of modern theorists,<sup>12</sup> took an implicit right to welfare or security of life far more seriously than did the constitutional Framers.<sup>13</sup>

This difficulty in distilling an unequivocal natural law position on the identification and status of rights is, as we shall see, suggestive of the indeterminacy of any particular plausible natural law theory in most contexts. Much of the remainder of this essay will trace some of these indeterminacies. Preliminarily, though, let us clear away a possible complication.

It may be tempting to maintain both that natural law theory, perhaps no less than law generally, is massively indeterminate, and simultaneously that natural law theory is, or tends to be, systematically politically repressive. That some may find both these contentions appealing, however, does not mean that they are genuinely mutually compatible. To begin with, if indeterminacy implies unpredictability, unreliability, or the disturbing of settled relationships, this is already in some tension with the idea of invariably, predictably oppressive judicial outcomes. The best reconciliation of these two theses turns

8. Such a distinction is drawn by Raoul Berger, citing Leo Strauss. See Raoul Berger, *supra* note 7, at 11-12 (quoting LEO STRAUSS, *THE POLITICAL PHILOSOPHY OF HOBBS* vii-viii (Elisa M. Sinclair trans., 1963)). For a mere fragment of the counterevidence, see Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 923 & 923 n.48 (1993).

9. See Berns, *supra* note 7, at 2.

10. See *THE POLITICAL IDEAS OF ST. THOMAS AQUINAS* 138 (Dino Bigongiari ed., 1953) [hereinafter *POLITICAL IDEAS*] (SUMMA THEOLOGICA II, II qu. 66, art. 7) ("whatever certain people have in superabundance is due, by natural law, to the purpose of succoring the poor"; going on to legitimize "theft" under such circumstances); *id.* at 46 (SUMMA THEOLOGICA I, II qu. 94, art. 2; (human inclination to seek to preserve one's life as reflective of the natural law).

11. See *id.* at 50-53 (SUMMA THEOLOGICA I, II qu. 94, arts. 4 & 5) (possession of individual property and general prohibition of theft as reflective of the natural law in at least some sense). But see *POLITICAL IDEAS*, *supra* note 10, for an important qualification. For commentary, see Alasdair MacIntyre, *The Splendor of the Truth*, 58 THOMIST 171, 180 (1994) (property ownership for Aquinas as stewardship; "theft" in cases of pressing necessity as not genuinely theft).

12. See the brief historical references in R. George Wright, *Could a Constitutional Amendment Be Unconstitutional?*, 22 LOY. U. CHI. L.J. 741, 743-44 (1991).

13. See *POLITICAL IDEAS*, *supra* note 10. For some relevant discussion of the Framers, see Sheldon Gelman, "Life" and "Liberty": *Their Original Meaning, Historical Antecedents, and Current Significance in the Debate Over Abortion Rights*, 78 MINN. L. REV. 585 (1994).

out to involve recognizing the potentially anti-repressive character of natural law theory.

We have already alluded to Aquinas on the value of redistribution of wealth.<sup>14</sup> More generally, even the most traditionalist of natural law theorists recognize "the plasticity of human inclinations,"<sup>15</sup> the range and diversity of legitimate basic human goods,<sup>16</sup> and the "all but numberless variety of ways"<sup>17</sup> in which persons can fulfill themselves consistent with the natural law. It is thus unsurprising that for Aquinas, "in very many, perhaps most situations of personal and social life there are a number of incompatible *right* (i.e. not-wrong) options."<sup>18</sup>

These sorts of recognitions obviously open the door to pluralism, diversity, and tolerance within natural law, with whatever degree of enhanced indeterminacy such qualities may bring. But it remains possible to suppose that natural law theory may still involve greater actual, or merely purported, determinacy than its rivals, insofar as natural law theory aims at moral truth. A non-natural law-based consent theorist,<sup>19</sup> for example, might grant that an indeterminately wide variety of arrangements can be validly consented to. But surely a natural law theory ultimately guided by a search for objective truth or falsity cannot be so blithely indeterminate. Some political or legal regimes might be freely consented to, yet remain potentially morally wrong, on some natural law theory.

No doubt it is possible to distinguish between natural law theory and non-natural law-based consent theory. One might even see the contrast between emphases upon truth and upon consent as rising to the level of a "dramatic battle"<sup>20</sup> in American constitutional thought.

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14. See *supra* notes 10-13 and accompanying text.

15. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 84 (1980).

16. See *id.* at 84-85.

17. RALPH MCINERNEY, *ETHICA THOMISTICA* 49 (1982).

18. John Finnis, *Natural Law and Legal Reasoning*, in *NATURAL LAW THEORY: CONTEMPORARY ESSAYS* 134, 152 (Robert P. George ed., 1992). Aquinas observes that "[i]n the case of the practical reason, . . . which is concerned with contingent matters, such as human actions, even though there be some necessary truth in the common principles, yet the more we descend to what is proper and peculiar, the more deviations we find." *POLITICAL IDEAS*, *supra* note 10, at 49 (*SUMMA THEOLOGICA* I, II qu. 94, art. 4). For an example of a post-Thomistic recognition of the objective moral value of diversity, see, e.g., Karl-Otto Apel, *Do We Need Universalistic Ethics Today or Is This Just Eurocentric Power Ideology?*, 35 *UNIVERSITAS* 79, 84 (1993).

19. For a recent such exposition, see BRUCE A. ACKERMAN, *WE THE PEOPLE* 14-15 (1991). For a general critique of Ackerman's project, see Suzanna Sherry, *The Ghost of Liberalism Past*, 105 *HARV. L. REV.* 918 (1992) (book review).

20. Paul W. Kahn, *Reason and Will in the Origins of American Constitutionalism*, 98 *YALE L.J.* 449, 454 (1989).

But the natural lawyer is hardly barred from endorsing a principle of consent as the most important substantive principle of natural law. There is nothing to stop the natural lawyer from embracing consent as, for example, the touchstone of constitutional legitimacy.

This is not to suggest that a sound natural law theory ought simply to describe and apotheosize genuine consent. Setting aside the familiar problems of consent theory,<sup>21</sup> there must be some accounting for such moral value as we may ascribe to consent. Consent is not self-evidently the most fundamental moral good. This is why Bruce Ackerman's apotheosis of free consent<sup>22</sup> is ultimately problematic. There must be deeper reasons for insisting upon free consent, based perhaps in considerations of individual human dignity or respect for individual rational capacity. But those reasons for valuing consent may themselves set limits to the proper moral scope or value of consent, as in possible cases of conflict between free consent and the dignity of persons.<sup>23</sup>

Thus consent theory cannot be all there is to natural law, but the correspondence between a given theory of natural law and consent theory may nonetheless be substantial. More broadly, a natural law theory need not focus simply on determinate substantive principles or on "truth," but may focus on variable, indeterminate, or process-oriented qualities such as consent or contract, democratic outcomes, history, custom, tradition, or even Burkean "prejudice."<sup>24</sup> Aquinas' own natural law theory, for example, perhaps along with that of the constitutional Framers, relies at crucial point not on self-evident truths, but on the habits, inclinations, history, traditions, and customs of a particular people, particularly at the level of law-making and law-enforcement, even at some cost in increased legal indeterminacy.<sup>25</sup>

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21. See, e.g., HARRY BERAN, *THE CONSENT THEORY OF POLITICAL OBLIGATION* (1987).

22. See Sherry, *supra* note 19, at 919 n.3.

23. For relevant discussion, see, e.g., GERALD DWORKIN, *THE THEORY AND PRACTICE OF AUTONOMY* (1988); BARBARA HERMAN, *THE PRACTICE OF MORAL JUDGMENT* (1993); THOMAS E. HILL, JR., *DIGNITY AND PRACTICAL REASON IN KANT'S MORAL THEORY* (1992). This, incidentally, is why Ackerman's willingness to judicially enforce a democratically endorsed state religion is problematic. See ACKERMAN, *supra* note 19, at 14-15. For further relevant discussion, see Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 *YALE L.J.* 453 (1989).

24. See EDMUND BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* 100 (Anchor Books ed., 1973). A natural lawyer might, for example, take seriously and give full effect to what she believes to be a moderately seriously erroneous democratic vote, on the grounds that acceding to even a mistaken such expression promotes the crucial objective moral values of dignity, autonomy, and equality.

25. See, e.g., *POLITICAL IDEAS*, *supra* note 10, at 81 (SUMMA THEOLOGICA I, II qu. 97, art. 2) ("when a law is changed, the binding power of the law is diminished in so far as custom is

The natural law theorist, therefore, need not be viewed as relying upon an allegedly "best moral theory" to restrict or modify the effects of history and tradition,<sup>26</sup> but may equally be seen as insisting that some abstract "best moral theory" incorporate and reflect, in vital ways, a range of contingent, vague, or indeterminate culturally-dependent considerations. Nor should it be forgotten that contingent historical institutions, such as contracts or alleged instances of consent, tend to work their way back toward an abstract "best moral theory," as when the law incorporates hazy, contested, and indeterminate considerations such as frustration of purpose, public policy, and substantive unconscionability into contract doctrine itself.<sup>27</sup>

We thus have some preliminary grounds for suspecting that despite any natural law focus on discrete principles or "truth," a plausible natural law theory is unlikely to typically generate moral or judicial outcomes more determinately than alternative, non-natural law theories.<sup>28</sup> Natural law indeterminacy exists, it seems, in any number of aspects, but at three general levels. First, there is the problem of metaphysical indeterminacy, or the mere existence of natural law answers to moral or judicial problems. Second, there is the problem of epistemic indeterminacy, or the ascertainability of such natural law answers by judges or anyone else. Finally, there is the problem of what we might call juridical indeterminacy, consisting of the special problems involved in judges' actually applying ascertained natural law principles to constitutional questions.

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abolished"); *id.* at 82 (qu. 97, art. 3) ("custom has the force of law, abolishes law, and is the interpreter of law"); *id.* at 60-61 (qu. 95, art. 3) (human law to be in accordance with custom and suitable to time and place). With respect to the Framers, James Whitman has formulated the relevant indeterminacy problem thus: "Revolutionary era lawyers unreflectively conflated reason and custom—which means that, in many respects, we can never draw definitive conclusions about constitutional interpretation from their writings." James Q. Whitman, *Why Did the Revolutionary Lawyers Confuse Custom and Reason?*, 58 U. CHI. L. REV. 1321, 1323 (1991).

26. See DAVID A.J. RICHARDS, *FOUNDATIONS OF AMERICAN CONSTITUTIONALISM* 12 (1989).

27. See, e.g., E. ALLAN FARNSWORTH, *CONTRACTS* § 4.28, at 495-96 (2d ed. 1990) (development of the doctrine of unconscionability as a means of limiting otherwise unfair bargains).

28. Roger Shiner classifies natural law theories along with positivist theories of law as united in rejecting the radical indeterminacy theses associated with the Critical Legal Studies movement. See ROGER A. SHINER, *NORM AND NATURE: THE MOVEMENTS OF LEGAL THOUGHT* 217 (1992). Professor Shiner goes on to associate natural law theory with an emphasis on flexibility in the law, and positivism with an emphasis on certainty in the law, *id.* at 326, but it is difficult to find a more concise exposition of the value of certainty and fixity in the law than the *Summa Theologica* I, II qu. 97, art. 2. Nor, on the other hand, do contemporary positivists seem uniformly inclined to adhere to the value of certainty in the law at any cost in substantive injustice.

The problem of metaphysical indeterminacy has been emphasized by contemporary scholars,<sup>29</sup> but was recognized to at least some degree even by Aquinas. Aquinas grants not merely that people actually disagree more readily over specific issues and problems than over broad principles generally proscribing harmful conduct, but that the natural law itself must reflect more "deviations" at the level of concrete problems.<sup>30</sup> This is quite apart from any cases in which the natural law simply does not point to even a useful range of preferred solutions to jurisprudential or moral problems.

It bears emphasis that while Aquinas sometimes pretends that the exceptions to familiar natural law principles will be few or readily specified, Aquinas also admits more forthrightly that the touchstone for departing from a general rule is the undeniably indeterminate inquiry into whether applying the rule would be "harmful" or "contrary to reason."<sup>31</sup> No list, controversial or uncontroversial, can possibly specify or exhaust such exceptions, regardless of the nature of the principle involved. The principle that, for example, property rights should be respected except where doing so would be harmful or unreasonable is of obviously limited determinacy.

Even assuming the existence of a relevant natural law principle does not, however, guarantee its epistemic accessibility.<sup>32</sup> John Hart Ely has famously argued that "you can invoke natural law to support

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29. See, e.g., Jeremy Paul, *First Principles*, 25 CONN. L. REV. 923, 933 (1993) ("[n]atural law claims might remain credible when framed in terms of generalities . . .," but lose credibility with increasing specificity).

30. See the quotation from the *SUMMA THEOLOGICA* cited *supra* note 18. See also POLITICAL IDEAS, *supra* note 10, at 50 (*SUMMA THEOLOGICA* I, II qu. 94, art. 4) (more specific norms of natural law as both valid and actually recognized in only a majority of cases). For a related kind of limitation, see *id.* at 59 (*SUMMA THEOLOGICA* I, II qu. 95, art. 2) (while some specific conclusions may be rigorously derived from general natural law principles, some moral problems simply do not admit of a unique, unequivocal morally best resolution).

31. See *id.* at 50 (*SUMMA THEOLOGICA* I, II qu. 94, art. 4) (illustrating this principle in the context of return of deposits). See also BRIAN DAVIES, *THE THOUGHT OF THOMAS AQUINAS* 246 (1993) (natural law not a list of instructions or table of rules unequivocally governing the range and variety of legal and moral decisionmaking contexts); R.J. HENLE, *SAINT THOMAS AQUINAS: THE TREATISE ON LAW* 269 (1993) (dictates of the natural law rendered indeterminate in some cases by relevant contingent particular circumstances). For a broader indeterminacy problem, see *id.* at 288 ("[A]ccording to St. Thomas, the Natural Law provides only general principles and general precepts which cannot possibly dictate all the detailed determinations necessary for the Common Good of any given society").

32. For discussion of this distinction, see, e.g., Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity and Authority*, 142 U. PA. L. REV. 549 (1993); Brian Leiter, *Objectivity and the Problems of Jurisprudence*, 72 TEX. L. REV. 187, 190 (1992) (reviewing KENT GREENAWALT, *LAW AND OBJECTIVITY* (1992)).

anything you want,"<sup>33</sup> and at least part of his point seems to be epistemic rather than metaphysical. In this, Ely reflects the equally well-known observation of Justice Iredell that "[t]he ideas of natural justice are regulated by no fixed standard; the ablest and the purest men have differed upon the subject. . . ."<sup>34</sup>

We shall briefly recur to the problems of metaphysical and epistemic indeterminacy below. In the meantime, though, the problem of what we have referred to as the juridical indeterminacy of natural law is of special interest. There are special reasons, peculiar to the constitutional or judicial decision-making context, that exacerbate the overall problem of indeterminacy. Plainly, judges cannot interpret and apply the Constitution in some sort of clinically objective fashion, even by invoking the idea of natural law.<sup>35</sup> There are several reasons why natural law theory ordinarily provides only limited guidance to the judge seeking to resolve constitutional issues.

Among the most important such reasons, though not widely discussed, is what we shall call the correspondence problem. The correspondence problem refers to the fact that there may well be a partial, if not a complete, disjunction between the basic principles of a plausible particular natural law system and the basic principles embodied in the federal Constitution. The disjunction flows from the fact that a natural law system tends to focus on the most generally crucial problems of morality, whereas a Constitution may well have goals or functions only tangentially related to promoting moral conduct generally.

The lack of correspondence between the subject-matter or functions of natural and constitutional law should not, of course, be overstated. Some overlap is almost inevitable in certain respects. Consider, for example, Aquinas' natural law injunction that the burden of a just law should be imposed equally or proportionately upon

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33. JOHN HART ELY, *DEMOCRACY AND DISTRUST* 50 (1980). See also Calvin R. Massey, *The Natural Law Component of the Ninth Amendment*, 61 U. CIN. L. REV. 49, 49 (1992) (quoting Ely on this point).

34. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 399 (1798). See also Helen K. Michael, *The Role of Natural Law in Early American Constitutionalism: Did the Founders Contemplate Judicial Enforcement of "Unwritten" Individual Rights?*, 69 N.C. L. REV. 421, 452 (1991) (quoting Justice Iredell's opinion).

35. See, e.g., Paul Brest, *Interpretation and Interest*, 34 STAN. L. REV. 765, 771 (1982).



the subjects,<sup>36</sup> which is plainly suggestive of the constitutional ideas of equal protection and due process.<sup>37</sup>

But the primary focus of at least Aquinas' version of the natural law does not link up consistently with American constitutional principles. More broadly, we cannot expect even modern exponents of general natural law theories to revise and recast their understandings of what they take to be the genuinely basic moral problems so as to shed more light on the particular jurisprudential issues arising under the Constitution.

Aquinas, for example, plainly thinks of the natural law as involving precepts such as preserving one's life,<sup>38</sup> knowing the truth about God,<sup>39</sup> living in society,<sup>40</sup> not offending others,<sup>41</sup> shunning ignorance,<sup>42</sup> returning borrowed items,<sup>43</sup> not stealing,<sup>44</sup> avoiding adultery,<sup>45</sup> not harming others,<sup>46</sup> not killing others,<sup>47</sup> and generally punishing evil.<sup>48</sup> These and similar matters obviously constitute the essential practical concerns and implications of at least the Thomistic version of the natural law. But to speak bluntly, these matters are in the main not central to, or even relevant to, our federal Constitution, including its protections of individual rights. To a great extent, then, the Thomistic natural lawyer and the judge considering a constitutional issue are simply not on the same wavelength, and are not even considering the same problems at different levels of generality. By and large, even our constitutional rights do not track, correspond to, mirror, or amount to reformulations or concrete specifications of Thomistic natural law duties.

It should be freely admitted that Aquinas discusses matters such as property ownership, and punishment, and that the Constitution in turn provides for the due process protection of property interests,<sup>49</sup>

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36. See *POLITICAL IDEAS*, *supra* note 10, at 71 (*SUMMA THEOLOGICA* I, II qu. 96, art. 4).

37. U.S. CONST. amend. XIV.

38. See *POLITICAL IDEAS*, *supra* note 10, at 46 (*SUMMA THEOLOGICA* I, II qu. 94, art. 2).

39. See *id.*

40. See *id.*

41. See *id.*

42. See *id.*

43. See *id.* at 49-50 (*SUMMA THEOLOGICA* I, II qu. 94, art. 4).

44. See *id.* (*SUMMA THEOLOGICA* I, II qu. 94, art. 5, ob. 2).

45. See *id.* at 51.

46. See *id.* at 53 (*SUMMA THEOLOGICA* I, II qu. 94, art. 5, reply obj. 3).

47. See *id.* at 59 (*SUMMA THEOLOGICA* I, II qu. 94, art. 5, obj. 2).

48. See *id.*

49. U.S. CONST. amends. V, XIV.

and proscribes cruel and unusual punishments.<sup>50</sup> But it must equally be noted how indeterminate Aquinas leaves the natural law in these and other respects. The broad institution of private property itself, and the allocation of particular property rights to particular persons, is thought by Aquinas to reflect positive law or historically contingent human agreement, and to at most amount to an addition to a natural law which originally provided for property to be held in common.<sup>51</sup> And while the natural law generally provides punishment for, indeterminately, some but far from all evil conduct,<sup>52</sup> punishing evil in any particular way, or to any particular degree, is at best not incompatible with the natural law, and draws no moral force or sanction from the natural law.<sup>53</sup>

There are thus indeterminacies where the natural law is silent, does not judicially address a particular kind of evil, or allows for a broad range of not unacceptable judicial determinations. These indeterminacies plainly differ in kind from the indeterminacy of not knowing whether something about our particular circumstances takes us out of the coverage of an otherwise applicable broad principle of natural law, as referred to above.<sup>54</sup>

Now, one could obviously avoid any indeterminacies specific to Aquinas by subscribing to any non-Thomistic natural law theory. One could instead endorse some natural law theory that dovetails more

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50. U.S. CONST. amend. VIII.

51. See *POLITICAL IDEAS*, *supra* note 10, at 130 (*SUMMA THEOLOGICA* II, II qu. 66, art. 2, reply obj. 1). For a brief discussion of Aquinas on changes in the natural law, and of the legitimacy of occasional departures from the natural law, see Paul E. Sigmund, *Law and Politics*, in *THE CAMBRIDGE COMPANION TO AQUINAS* 217, 225-27 (Norman Kretzmann & Eleonore Stump eds., 1993). For startlingly contrasting perspectives in the context of the Framers' approach to natural law, compare Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1133 (1987) (fundamental law as susceptible to limited change for Framers) with Farber, *supra* note 1, at 1093 (framers as largely indifferent to possibility of change in fundamental law) and Paul Campos, *Three Mistakes About Interpretation*, 92 MICH. L. REV. 388, 389 (1993) (apparently assuming that mainstream natural law theory would see no reason to provide for changes in natural law).

52. See *POLITICAL IDEAS*, *supra* note 10, at 59 (*SUMMA THEOLOGICA* I, II qu. 95, art. 2). See also Randy E. Barnett, *The Intersection of Natural Rights and Positive Constitutional Law*, 25 CONN. L. REV. 853, 861 n.23 (1993).

53. See *POLITICAL IDEAS*, *supra* note 10, at 59 (*SUMMA THEOLOGICA* I, II qu. 95, art. 2).

54. See *supra* notes 10-11, 18, 30, 31 and accompanying text. See also, e.g., *POLITICAL IDEAS*, *supra* note 10, at 50 (*SUMMA THEOLOGICA* I, II qu. 94, art. 4) (while deposits should generally be restored to their owner, the deposit should not be so restored if to do so would be "harmful and consequently contrary to reason").

closely with the concerns of the Constitution, and which typically provides more determinate answers to important questions of constitutional law. Unless one had other reasons for endorsing the alternative natural law theory in question, though, such a course would seem ad hoc, if not irresponsible. Presumably, one would reject Thomistic natural law theory in favor of some alternative natural law theory primarily because the latter is thought to be in some sense truer, and not because it ties in more neatly with pressing constitutional issues, however false the theory itself may be.

Admittedly, it need not be ad hoc to announce oneself, for example, a Lockean natural lawyer, with an eye to endorsing Locke's emphasis on the right or duty of preserving life, liberty, and property<sup>55</sup> and applying those concerns in our constitutional context. But taking Locke's natural law theory seriously would mean accepting its basic logic, which explains the obligations not to harm other persons in their life, liberty, and property on the grounds that each of us is legally held to be the property, or the servant, of God.<sup>56</sup>

No doubt Lockean natural law could be secularized, with some purely secular principles taking over the crucial justificatory role. But it is difficult to believe that any modified and attractive Lockean natural law theory would be generally more determinate in its judicial or constitutional implications than some plausible alternative non-natural theory of constitutional interpretation.<sup>57</sup>

This is not to suggest that a relatively determinate natural law theory of constitutional interpretation cannot be imagined. It can. This follows from the reasonable premises that not all possible theories of constitutional interpretation are equally indeterminate, and that any non-natural law theory of constitutional interpretation can be re-cast in analogous natural law or moral objectivist terms.

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55. See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* § 123, at 395 (Peter Laslett rev. ed., 1965).

56. See *id.* § 6, at 211 & § 135 at 403. See also JOHN DUNN, *THE POLITICAL THOUGHT OF JOHN LOCKE* 127 (1969); Patrick Riley, *Locke on "Voluntary Agreement" and Political Power*, 29 W. POL. Q. 136, 136-37 (1976); Bruce N. Morton, *John Locke, Robert Bork, Natural Rights and the Interpretation of the Constitution*, 22 SETON HALL L. REV. 709, 723 (1992); J.B. Schneewind, *Kant and Natural Law Ethics*, 104 ETHICS 53, 63, 73 (1993) (discussing the relevantly similar view of Kant as well as that of Locke).

57. Even a secularized Lockean natural law probably emphasizes peace, safety, and personal security more than does our Constitution. See, e.g., LOCKE, *supra* note 55, § 131, at 399. This lack of "correspondence" is of course remediable by further modifying "Lockean" natural law theory, but the essential problems of judicial indeterminacy, or the lack of any advantage in this respect over non-natural law theories of constitutional interpretation, remain.

Consider, for example, the relatively complete and determinate approach to constitutional interpretation which we may call the contemporaneous Gallup Poll theory. On this theory, constitutional issues are to be resolved by judges in accordance with a popular opinion poll tapping preferences as among litigant-framed alternatives on the day following oral argument in the case at issue. The plurality response is then deemed to be what the Constitution requires.

While the Gallup Poll theory may not avoid all indeterminacy, it is clearly better than most in this respect. Nor is it utterly devoid of any normative appeal, at least for all those who consider contemporary mores a partial guide to constitutional adjudication.<sup>58</sup> Inevitably, the Gallup Poll theory comes in a natural law version, which would hold that the poll results not only indicate popular preferences or beliefs, but also indicate the genuinely objective, if transient, moral truth regarding constitutional issues, including matters of free speech, the establishment of religion, equal protection, and due process.

Admittedly, then, we can imagine a possible natural law theory of constitutional interpretation no less determinate than some rival non-natural law theory. But the natural law and non-natural law versions of the Gallup Poll theory of constitutional interpretation are not equally plausible. Despite any grounds for believing that the vox populi is the vox Dei,<sup>59</sup> the non-natural law version of the Gallup Poll theory is, on its own terms, more plausible to most of us than its natural law counterpart.

Let us contrast the two versions of the Gallup Poll theory, beginning with the non-natural law version. Deciding a constitutional law case by ascertaining current popular preferences in the matter is at least sometimes a plausible approach, if natural law theories are to be ruled out. But the natural law analogue of this Gallup Poll theory, that mere plurality preference either constitutes, or somehow systematically reflects or points toward, objective moral truth, is simply not as plausible.<sup>60</sup>

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58. See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 136, 141 (1989) (Brennan, J., dissenting).

59. The English theologian Alcuin urged that "those people should not be listened to who keep saying the voice of the people is the voice of God, since the riotousness of the crowd is always very close to madness." *THE OXFORD DICTIONARY OF QUOTATIONS* 8 (Angela Partington ed., 4th ed. 1992).

60. Admittedly, there is some Thomistic support for the view that at least the most abstract and general principles of natural law are known to most persons and most cultures, even though the natural law is not ordinarily constituted by popular subjective belief. See, e.g., *POLITICAL*

Both the natural law and non-natural law versions of the Gallup Poll theory tend to cope poorly with any counter-majoritarian role for our Constitution. This is thus a defect both versions share. But the two versions are in another respect not equally plausible on their own terms. At least in the modern era, an important potential function of an attractive natural law theory is not only to protect various sorts of minorities against unsympathetic pluralities, but more generally to uphold the notion that there is more to truth than nose-counting.<sup>61</sup> A natural law theory that merely points back to nothing more than nose-counting of perhaps arbitrarily formed popular preferences is thus unconvincing as a theory of objective truth and natural law. Thus, while the natural law version of the Gallup Poll theory may be no less determinate in its implications than its non-natural law analogue, it is less plausible on its own terms, because of its peculiarly awkward attempt to combine nose-counting and objectivity, a vice not shared by the non-natural law version of the Gallup Poll theory.

In general, otherwise genuinely plausible natural law theories of constitutional interpretation tend to be relatively indeterminate, compared to at least some non-natural law alternative equally plausible on its own terms. Whether natural law approaches can offer any counter-vailing advantages, however, is an issue we shall briefly explore below.<sup>62</sup>

In the meantime, we should appreciate a further problem of indeterminacy. Even if a judge believes that there is a natural law, that the natural law is logically relevant to the constitutional issues in the case, and that the relevant natural law principles are genuinely ascertainable, not just in principle, but by that judge,<sup>63</sup> a further source of indeterminacy looms. It is actually far from clear that a natural law judge

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IDEAS, *supra* note 10, at 50 (SUMMA THEOLOGICA I, II qu. 94, art. 4). But, especially in a diverse, pluralistic culture such as ours, it is simply not credible that public opinion poll results on concrete, specific contested issues of constitutional law reliably reflect the objective moral truth. To imagine, for example, that the genuinely objective moral status of affirmative action or capital punishment is reliably reflected in, or typically hops about in deference to shifts in, popular opinion is to decline to take natural law seriously. This conclusion must, admittedly, be qualified to reflect the extent to which the natural lawyer may legitimately want to take matters such as current custom, binding contracts, or the democratic process into account. See *supra* notes 20-27 and accompanying text.

61. This is not to suggest that all natural law theories of constitutional interpretation are adequately sensitive to minority rights, or that non-natural law theories cannot be adequately sensitive to minority rights. Both of these clearly false claims are irrelevant to our argument.

62. See *infra* part III.

63. We may, for our purposes, at least temporarily set aside the complication of any disagreement between the judge and the authoritatively interpreted Constitution.

should allow her constitutional decisions to be guided by the apparently most directly applicable substantive principles of natural law.

It is occasionally argued that the natural law judge will tend to focus on presumably objectively true moral principles relevant to the case.<sup>64</sup> This may well be commonly true, and at least in some meta-sense, perhaps must be true: why would a conscientious natural law judge intentionally decide a constitutional case contrary to the natural law?

But on reflection, there are any number of reasons why a natural law judge might, in a way that typically tends to further reduce the determinacy of natural law theory in constitutional adjudication, wish to subordinate the substance of the natural law. For example, judges typically undertake an oath to uphold the Constitution, whether that Constitution is normally construed in a natural law fashion or not. There may be no guarantee that the authoritatively construed Constitution will be invariably fully compatible with the particular judge's own understanding, or any judge's understanding, of the provisions of the natural law. Admittedly, reconciling the natural law with a voluntary promise by the judge to, in effect, decide some cases in a way somehow apparently inconsistent with the natural law may itself be a higher order natural law question, but the substantive precepts of the natural law may regardless be set aside in some or all such cases. Nor is the indeterminacy avoided by arguing that the natural law may itself require judges to uphold their judicial oaths in some or all cases. The judge must still choose between keeping the oath, and choosing what in the absence of the oath, and perhaps even given the oath, would be mandated by natural law.

As well, a natural law judge might easily conclude that one possible case law outcome is less justifiable under the general principles of natural law than another, but nonetheless preferable overall, as reflecting the values of custom and tradition, or for that matter, novelty. Or a judge might conclude that an outcome otherwise contrary to the most relevant substantive principles of natural law might be rescued by its contribution to the objective moral value of tolerance,

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64. See, e.g., Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 287-88 (1985). In defining natural law interpretation, though, Professor Moore requires only some unspecified, potentially quite limited role for natural law, as opposed to a shared or conventional morality. *Id.* at 286. Cf. Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 752 (1982) ("[T]he natural law tradition . . . demands that the judge give morality the decisive role in the interpretation of the legal text").

autonomy, pluralism, stability, peace, or democratic self-determination. There are any number of objective moral grounds for reasonable governmental self-restraint in enforcing particular moral norms in particular cases.<sup>65</sup> This sort of logic again tends to enhance the indeterminacy of natural law adjudication. It is of course possible to again observe that no natural law principle that is properly trumped by other legitimate natural law-based considerations can possibly be what the natural law requires, but this merely formal point does not restore the adjudicative determinacy of the natural law in this respect.

As a final, related example, consider the problems of the practical enforceability of judicial decrees, preservation of judicial "institutional capital," or even of judicial institutional prestige. Again, it is possible to argue that the natural law itself has long recognized<sup>66</sup> and even sought to resolve conflicts between an abstractly right answer, and the high costs to natural law and other valuable institutions of seeking to impose that ideal result on a recalcitrant legal environment. Natural lawyers are as aware as anyone of the costs of judicial decisions' backfiring, or of bringing sound judicial institutions into disrepute. The judicial indeterminacy, however, remains.

Each of these further judicial indeterminacy problems may, in principle, be resolvable. But the apparent absence of determinate solutions raises a further indeterminacy for the natural law judge: Should she resolve such issues based on her own best insight into the natural law, or should she defer, in at least some cases, to the potentially incompatible view of what the natural law really requires that is held by some other governmental branch or actor?<sup>67</sup> While natural

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65. For a concise but thorough discussion of such possible reasons, see Julia Driver, *Hyperactive Ethics*, 44 PHIL. Q. 9 (1994).

66. See, e.g., POLITICAL IDEAS, *supra* note 10, at 68 (SUMMA THEOLOGICA I, II qu. 96, art. 2, reply obj. 2) ("[O]therwise these imperfect ones, being unable to bear such precepts, would break out into yet greater evils"). See also Thomas B. McAfee, *Prolegomena to a Meaningful Debate of the "Unwritten Constitution"* Thesis, 61 U. CIN. L. REV. 107, 116 n.31, 117 n.32 (1992) (discussing Aquinas on this point).

67. Cf. Frederick Schauer, *Constitutional Positivism*, 25 CONN. L. REV. 797, 809 (1993) ("[t]hat there are natural rights does not lead inexorably to the conclusion that it is the task of particular officials to identify and enforce them") (emphasis in the original). See also the exchange between Sotirios A. Barber, *supra* note 3, and Michael W. McConnell, *A Moral Realist Defense of Constitutional Democracy*, 64 CHI.-KENT L. REV. 89 (1988), and the stronger claim of Professor Thomas Nagel, *The Supreme Court and Political Philosophy*, 56 N.Y.U. L. REV. 519, 519 (1981) ("Even a believer in the existence of objectively discoverable ethical truth will not want to assign to the Court general jurisdiction over the determination and enforcement of that truth."). For an unusually sensitive, concise exposition of the related broader problems of unduly casual inferences from the mere existence of objective moral truth to its ascertainment by specified officers to its coercive implementation, see Kent Greenawalt, *Shortfalls of Realism*,

law theory may purport to offer at least some vague answer even here, we may have more confidence in a judge whose decisions in this respect flow not from any contested reading of the natural law, but from what we happen to take to be the exceptional integrity, judgment, character, and fitness of some particular judge,<sup>68</sup> however indeterminate the specification of these judicial virtues may be. To the extent that each natural law judge may or may not be the best judge of the natural law, as compared to other judges or to elected officials, this final judicial indeterminacy problem remains.

Certainly, these sorts of indeterminacy problems may, in some loosely analogous form, afflict non-natural law-based theories as well. But as we have seen, natural law theories tend to close the indeterminacy gap relative to non-natural law theories only by sacrificing plausibility.

### III. NATURAL LAW AND THE VALUE OF OBJECTIVITY

Given the multiple, quite substantial, and not readily resolvable indeterminacies attendant upon any otherwise plausible natural law theory of constitutional adjudication, it is tempting to conclude by simply minimizing the value of such theories. Michael Oakeshott endorsed this view when he concluded that "the correspondence of a political proposal with Natural Law . . . must be considered either irrelevant or as clumsy formulations of other and relevant inquiries, and must be understood to have a merely rhetorical or persuasive

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*Shared Social Values, and Authority: The Problem of Political Coercion*, 73 J. RELIGION 537, 542-43 (1993).

68. See Michael S. Moore, *Do We Have an Unwritten Constitution?*, 63 S. CAL. L. REV. 107, 136-37 (1989); Mark Tushnet, *The Degradation of Constitutional Discourse*, 81 GEO. L.J. 251, 251 (1992); Mark Tushnet, *Constitutional Interpretation, Character, and Experience*, 72 B.U. L. REV. 747, 747 (1992). For some Thomistic background, see THOMAS AQUINAS, *TREATISE ON THE VIRTUES* (John Oesterle trans., 1966) and *POLITICAL IDEAS*, *supra* note 10, at 49-50 (*SUMMA THEOLOGICA* I, II qu. 94, art. 4) (discussing differences in aptitude or disposition among persons in recognizing precepts of the natural law). The crucial, and today underemphasized, role of *phronesis* or prudence in political decisionmaking is of course classically expounded in ARISTOTLE, *NICOMACHEAN ETHICS* book 6, chs. 5-11.



value.”<sup>69</sup> When we toss in the suspicion that key concepts in any plausible language-embedded natural law theory of constitutional adjudication will be “essentially contestable,”<sup>70</sup> or inherently approachable from conflicting perspectives, the prospects for such a natural law theory appear bleak.

But it should be remembered that we have been defining natural law not much more narrowly than any judicial appeal to moral objectivity. We should therefore grant that natural law theories have no distinct, special value only if the idea of moral objectivity itself in this context has no distinct, special value. Now, just this thesis has been impressively argued for.<sup>71</sup> We shall, however, briefly argue to the contrary, for the distinctive value of moral objectivity, and thereby for the distinctive value of natural law, despite the admitted multiple indeterminacy of the latter.

In contemporary philosophy, the idea of objectivity is used in any number of senses. Objectivity in the law often means something quite different than objectivity in morality. And certainly, there are several possible meanings of objectivity in the legal context and in the moral context. On many understandings, the objectivity of morals does not imply legal objectivity, and legal objectivity does not imply moral objectivity. Even if all stealing were morally wrong, for example, that would not imply a legal system that constrains or should constrain the discretion of the judge in cases of actual or alleged stealing. The ready accessibility of legally right answers to legal questions hardly implies that those answers will be objectively morally right. Nor, for that matter, does either moral or legal objectivity say very much about the

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69. Michael Oakeshott, *Political Education*, in *RATIONALISM AND POLITICS AND OTHER ESSAYS* 111, 134 (1984). Cf. Steven L. Winter, *Indeterminacy and Incommensurability in the Law*, 78 CAL. L. REV. 1443, 1448-50 (1990) (seeking to reject the pretension to objectivity in the law, while avoiding a descent into arbitrary, subjective decisionmaking).

70. The crucial cite for this notion is W.B. Gallie, *Essentially Contested Concepts*, 56 PROC. OF THE ARISTOTELIAN SOC'Y 167 (1956). See also WILLIAM E. CONNOLLY, *THE TERMS OF POLITICAL DISCOURSE* 10-41 (1974); Alasdair MacIntyre, *The Essential Contestability of Some Social Concepts*, 84 ETHICS 1, 9 (1974) (perhaps inadvisedly citing the idea of a contract as not falling into the essentially contested category). See also Fiss, *supra* note 64, at 743 (asking whether 'freedom' pertains "exclusively to the absence of restraint, or does it also embrace an affirmative capacity for self-realization?") quoting I. BERLIN, *Two Concepts of Liberty* in *FOUR ESSAYS ON LIBERTY* 118 (1969).

71. See, e.g., Jeremy Waldron, *The Irrelevance of Moral Objectivity*, in *NATURAL LAW THEORY: CONTEMPORARY ESSAYS* 158 (Robert P. George ed., 1992). For background, see, e.g., SIMON BLACKBURN, *ESSAYS IN QUASI-REALISM* (1992). For further development of Waldron's views, see Jeremy Waldron, *Assurances of Objectivity*, 5 YALE J.L. & HUMAN. 553 (1993) (reviewing KENT GREENAWALT, *LAW AND OBJECTIVITY* (1992)).

degree of determinacy or indeterminacy or ready ascertainability of appropriate legal judgments.

We should thus feel free to define moral objectivity and legal objectivity pretty much as we wish. Presumably, we will want to define objectivity in either context in such a way as to allow us to confront and resolve some theoretical or practical problem with which we are concerned. What we must not do, however, is to define objectivity in one way for purposes of confronting one problem, while assuming that the same conception of objectivity will serve equally well in resolving some related, but distinct problem.

Let us briefly illustrate. It is common enough to define legal objectivity in terms, roughly, of the logical or practical constraints on judicial decisionmaking imposed by the shared conventional understandings of some relevant legal interpretive community in which the judge is assumed to hold membership. We may assume that this sort of conventionalist-communitarian view of legal objectivity is suited to resolving certain genuine problems including, most obviously, that of utterly capricious, subjective, personally idiosyncratic judicial decisionmaking. Recourse to convention and community can conceivably be used to at least criticize, if not effectively discourage, personal idiosyncrasy in judicial decisionmaking.

But sheer personal idiosyncrasy is not the only way in which judicial decisionmaking may go awry. A judicial decision might, for example, be a thoroughly conventional, predictable, rigorously systematic application of the most relevant shared group norms, yet strike at least an outsider as a moral outrage. The understanding of legal objectivity referred to above may control individual idiosyncrasy, but by its own terms may rise no higher than some sort of convention-bound legal group relativism. It is at least conceivable that someone from some vantage point may want to say that the group's conventions are in relevant part wrong. It is admittedly possible to denounce one group's legal conventions merely from the standpoint of another group's contrasting legal conventions. But a reasonable person could imagine that such a critique may ultimately have less purchase than a critique of a different sort, based on the claim that a legal judgment may be legally objectively sound in the above sense, yet morally objectively unsound, or unsound in a stronger sense of legal objectivity, transcending mere group conventions.

We shall develop this theme below. In the meantime, there are popular conceptions of legal objectivity that do not afford much of a

handle on theoretical and practical problems of great potential importance that might be more readily manageable by reference to moral objectivity, perhaps in conjunction with stronger conceptions of legal objectivity.

While we shall not pin down a precise meaning of the idea of objectivity, we shall nonetheless require the use of a fairly strong sense of the term.<sup>72</sup> Objectivity in a weak sense may again require only something like transcending some particular specified bias,<sup>73</sup> authoritativeness,<sup>74</sup> a standard external to the decisionmaker whether that standard is authoritative or not,<sup>75</sup> or a matter of judgment disciplined and constrained by some standard-setting community rules.<sup>76</sup> Stronger senses of objectivity might thus involve the fuller transcending of bias or of mere group conventional norms, or the transcending and correction of what might be called appearances.<sup>77</sup>

Obviously, there are other ways of conceiving of strong senses of objectivity. But even the apparently obscure idea of correcting appearances is often serviceable. This idea need not require us to miraculously step outside of our own perceptions and conventions in any problematic sense. We correct appearances, or at least better understand them, in the empirical or scientific realm when we decide, for example, that apparently straight sticks are not fractured by immersion in water and repaired by withdrawal from water, possible appearances to the contrary.

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72. For one possible typology of different senses of the term 'objective,' see Brian Leiter, *supra* note 32, at 192-93. Arguably the most useful extended treatment of the various possible senses of 'objectivity' in both moral and legal contexts is provided in KENT GREENAWALT, *LAW AND OBJECTIVITY* (1992).

73. See, e.g., Arthur Ripstein, *Questionable Objectivity*, 27 *NOÛS* 355, 361 (1993); Heidi Li Feldman, *Objectivity in Legal Judgment*, 92 *MICH. L. REV.* 1187, 1212-13 (1994) (purpose of idea of legal or judicial objectivity is to contrast with the subjective, or with the arbitrary, purely personal, idiosyncratic or the whimsical, thereby providing interpersonal validity); David Millon, *Objectivity and Democracy*, 67 *N.Y.U. L. REV.* 1, 10, 23-24, 32 (1992) (legal objectivity as referring to internal constraints on interpretation arising from membership in a shared interpretive community, not to correspondence to reality).

74. See, e.g., Robert W. Bennett, *Objectivity in Constitutional Law*, 132 *U. PA. L. REV.* 445, 447 (1984).

75. See *id.*

76. See, e.g., Fiss, *supra* note 64, at 744. See also *id.* at 748 ("Objectivity is compatible with error: An objective interpretation is not necessarily a correct one.").

77. See, e.g., JONATHAN DANCY, *MORAL REASONS* 146-47 (1993) (characterizing the approach to the idea of objectivity taken by Thomas Nagel).

It is worth noting that any inclination to abandon the idea of objectivity in jurisprudence is not supported by any analogous contemporary abandonment of the pursuit of objectivity in science.<sup>78</sup> Contemporary interest, either explicit<sup>79</sup> or implicit,<sup>80</sup> in sophisticated versions of objectivity theses in science seems vigorous. There is, in fact, a case to be made for the view that without obvious logical fallacy, objective progress in basic science can loosely, suggestively support particular basic objective moral approaches and models.<sup>81</sup> For example, the pursuit of scientific objectivity may lead us in the direction of appreciating the inherent relatedness of persons, or the incapability of a holistic, as opposed to a discretely atomistic, view of all that exists.<sup>82</sup>

78. Cf. ELY, *supra* note 33, at 52 ("[P]erhaps physical laws will be found 'out there,' though even that faith is fraying, but in any event moral laws will not.").

79. See, e.g., JAMES ROBERT BROWN, *SMOKE AND MIRRORS: HOW SCIENCE REFLECTS REALITY* (1994) (realist accounts as, at least, providing enlightenment by embedding those events in broader narrative accounts indicating why the event in question was a non-miraculous possibility); MICHAEL DEVITT, *REALISM AND TRUTH* (2d ed. 1991); RICHARD HEALEY, *THE PHILOSOPHY OF QUANTUM MECHANICS: AN INTERACTIVE INTERPRETATION* 6-7 (1989); PHILIP KITCHER, *THE ADVANCEMENT OF SCIENCE* 161-62 (1993) (Realism "does not imply that we have unbiased access to nature, merely that the biases are not so powerful that they prevent us from working our way out of false belief"); *id.* at 162 n.45 (arguing that epistemic foundationalism has more often than not been associated with antirealism, rather than realism); DAVID PAPIERNEAU, *REALITY AND REPRESENTATION* (1987).

80. See, e.g., NANCY CARTWRIGHT, *NATURE'S CAPACITIES AND THEIR MEASUREMENT* (1993) (setting aside some basic issues, but relying upon the ideas of general and single-case causation, as well as on the "capacity" of properties of entities to produce effects); Yakir Aharonov, Jeeva Anandan, and Lev Vaidman, *Meaning of the Wave Function*, 47 *PHYSICAL REV. A* 4614 (1993); Yakir Aharonov & Lev Vaidman, *Measurement of the Schrodinger Wave of a Single-Particle*, 178 *PHYSICS LETTERS A* 38 (1993); Wojciech H. Zurek, *Decoherence and the Transition from Quantum to Classical*, 44 *PHYSICS TODAY* 36 (1991). See also Chris J. Isham, *Quantum Theories of the Creation of the Universe*, in *QUANTUM COSMOLOGY AND THE LAWS OF NATURE* 49, 89 (Robert John Russell, Nancey Murphy & Chris J. Isham eds., 1993) (noting that one possible "escape" from an emphasis on holism and interdependence in physics may be, interestingly, a far more "realist" view of quantum phenomena than has been orthodox).

81. See, e.g., JOHN LESLIE, *UNIVERSES* 198 (1989); JOHN POLKINGHORNE, *REASON AND REALITY* 77 (1991); William Lane Craig, *Theism and Big Bang Cosmology*, 69 *AUSTRALASIAN J. PHIL.* 492 (1991); Richard Swinburne, *Argument from the Fine-Tuning of the Universe*, in *PHYSICAL COSMOLOGY AND PHILOSOPHY* 154 (John Leslie ed., 1990); Joseph M. Zycinski, *The Anthropic Principle and Teleological Interpretations of Nature*, 41 *REV. METAPHYSICS* 317 (1987). See also R. GEORGE WRIGHT, *REASON AND OBLIGATION* ch. 7 (1994). But see, e.g., Adolf Grünbaum, *Creation As a Pseudo-Explanation in Current Physical Cosmology*, 56 *PHI. SCI.* 373 (1989); Anthony O'Hear, *Science and Religion*, 44 *BRIT. J. PHIL. SCI.* 505, 511 (1993); Quentin Smith, *The Uncaused Beginning of the Universe*, 55 *PHIL. SCI.* 39 (1988); Victor J. Stenger, *The Universe: The Ultimate Free Lunch*, 11 *EUROPEAN J. PHYSICS* 236 (1990). More neutrally, see Ernan McMullin, *Indifference Principle and Anthropic Principle in Cosmology*, 24 *STUD. HIST. PHIL. SCI.* 359 (1993).

82. See, e.g., Henry Stapp, *Quantum Theory and the Physicist's Conception of Nature: Philosophical Implications of Bell's Theorem*, in *THE WORLD VIEW OF CONTEMPORARY PHYSICS:*

No doubt jurisprudential theories that reject any objectivity of morals can very widely imitate natural law theories. Writers who reject all moral objectivity are not logically barred from adapting familiar moral concepts, such as "growth" and "improvement,"<sup>83</sup> for use in attenuated senses.

As well, there is nothing to stop a society that rejects moral objectivity from instructing its judges to occasionally overturn statutes, for example, on moral grounds. Such a society may, for any reason or no reason, simply ascribe great value to avoiding error in recognizing and applying its non-objective moral norms, and may consider judges to be in at least some cases more able defenders of those moral norms than are legislators.

Thus societies that reject moral objectivity can in a sense talk, and judicially act, like societies that do not. Whether societies can eschew moral objectivity while, from our current standpoint, likely remaining morally attractive over the long term is more doubtful. It is at least initially jarring to be told, for example, by Richard Rorty that there is no moral fact of the matter regarding, or objective moral difference between, a thoroughly socialized Third Reich and a world without Nazism.<sup>84</sup>

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DOES IT NEED A NEW METAPHYSICS? 38, 57 (R. Kitchener ed., 1988) (A human "appears no longer as an isolated automaton"); Paul Teller, *Relational Holism and Quantum Mechanics*, 37 BRIT. J. PHIL. SCI. 71, 73 (1986) (discussing inherent, as opposed to merely supervenient, relatedness among apparently separate individuals). For broader discussion, see PHILOSOPHICAL CONSEQUENCES OF QUANTUM THEORY: REFLECTIONS ON BELL'S THEOREM (James Cushing & Ernan McMullin eds., 1989). For relevant discussion, see R. George Wright, *Should the Law Reflect the World?: Lessons for Legal Theory from Quantum Mechanics*, 18 FLA. ST. U. L. REV. 855 (1991). For a possible extension of inseparability, see Gerhard C. Hegerfeldt, *Causality Problems for Fermi's Two-Atom System*, 72 PHYSICAL REV. LETTERS 596 (1994). Especially in light of the affinity between much feminist theory and some version of inherent relationalism, see Ann Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373, 1401 (1986) (linking results in physics to feminist theory).

83. See, e.g., OWEN FLANAGAN, *VARIETIES OF MORAL PERSONALITY: ETHICS AND PSYCHOLOGICAL REALISM* 334-35 (1991); Jeffrey Stout, *Truth, Natural Law, and Ethical Theory*, in *NATURAL LAW THEORY: CONTEMPORARY ESSAYS* 71 (Robert P. George ed., 1992). But cf. Owen Flanagan, *Review of Charles Taylor's The Malaise of Modernity*, 104 ETHICS 192, 194 (1993) (expressing less confidence in the viability of a merely constructed, non-objective morality).

84. See, e.g., Richard Rorty, *Putnam and the Relativist Menace*, 90 J. PHIL. 443, 451 (1993). Rorty analogizes the situation to the lack of any moral or other objective preferability that one species survive a Darwinian conflict with another species. *Id.* For a contrasting perspective on the possibility of moral objectivity, see THOMAS KENEALLY, *SCHINDLER'S LIST* (1993). For an example of a more explicitly philosophical response, see Robert Kane, *The Ends of Metaphysics*, 33 INT. PHIL. Q. 413 (1993), and, more broadly, ROBERT KANE, *THROUGH THE MORAL MAZE: SEARCHING FOR ABSOLUTE VALUES IN A PLURALISTIC WORLD* (1994).

It seems to be assumed by most contemporary academics who reject moral objectivity that such a rejection will tend to promote, or at least not discourage, the instantiation of traditional liberal or progressive communitarian values.<sup>85</sup> But it has been noticed that the grounds for this undeniably attractive assumption are dubious.<sup>86</sup> Doubtless many morally objectivist societies have, by current standards, been far less morally sound or attractive than others. It may even be true that the worst possible morally objectivist society is less attractive than some feasible non-objectivist society. But it is difficult to escape the impression that most liberals and progressive communitarians wish to see, at least among dominant groups, more self-sacrifice, self-restraint at the level of individuals and groups, altruistic behavior, and genuine concern for strangers than is likely to be uncoercedly on widespread display, in the long run, in most societies that have wrung moral objectivity out of their thinking.<sup>87</sup> The major problem may well not be excessive overt social conflict, but preoccupation with concerns of self and one's group that are both metaphysically unambitious and not directly conflict-generating, such as the pursuit of low-cost gratifying sensory experiences. The pursuit of basic gratifications need not involve contested metaphysical presuppositions, significant claims on others, or the significant redistribution of power or wealth.

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85. See, e.g., Richard Rorty, *Postmodernist Bourgeois Liberalism*, 80 J. PHIL. 583 (1983).

86. See, e.g., Mark V. Tushnet, *The Left Critique of Normativity*, 90 MICH. L. REV. 2325, 2346 (1992). See also STEPHEN MACEDO, *THE NEW RIGHT V. THE CONSTITUTION* 36 (1986) (noting the moral skepticism of Robert Bork). If one were forced to speculate on the roots of the belief that rejecting moral objectivity will tend to be politically progressive, one might start with the undeniable oppressiveness of some, but not all, historical moral systems claiming objectivity, as well as the hope that moral relativism will promote the interests of oppressed groups better than any asserted objective moral rightness of pluralism, tolerance, and diversity. And on some versions of Marxism, academics could identify with the interests of the historically inevitable victors, the working class, without relying on moral objectivity.

87. See, e.g., O'Hear, *supra* note 81, at 514; Timothy P. Jackson, *The Theory and Practice of Discomfort: Richard Rorty and Pragmatism*, 51 THOMIST 270, 289 (1987). But see Richard T. Garner, *Are Convenient Fictions Harmful to Your Health?*, 43 PHIL. EAST & WEST 87, 98 (1993) (discussing the work of Simon Blackburn and relying upon "informed compassion" in the absence of any objectivity in ethics). See also RICHARD RORTY, *CONTINGENCY, IRONY AND SOLIDARITY* 85 (1989); Fred D'Agostino, *Transcendence and Objectivity: Two Conceptions of Objectivity*, 30 AM. PHIL. Q. 87 (1993); Mark Douglas Mercer, *On a Pragmatic Argument Against Pragmatism in Ethics*, 30 AM. PHIL. Q. 163 (1993); Richard Warner, *Why Pragmatism? The Puzzling Place of Pragmatism in Critical Theory*, 1993 U. ILL. L. REV. 535. It might be that compassion in the absence of objectivity tends, if we are not all equally compassionate, to invite exploitation, by setting up incentives for everyone to adopt increasingly extreme substantive views, and then demand compassion in the form of partial accommodation of those increasingly extreme views. This sort of problem may afflict the argument in ROBERT A. BURT, *THE CONSTITUTION IN CONFLICT* 359 (1992).

Self-sacrifice on behalf of strangers, in the absence of any purportedly objective justification, may transiently hold some Romantic appeal, but that sort of motivation does not seem sufficient to ground a viable and, on current widely shared standards, attractive moral civilization over time. Ultimately, a bit more metaethical ambitiousness seems called for. As George Fletcher has recently observed, "[f]or an argument to be worth making, it must be cast in a language that appeals to those who have no loyalties to the proponent."<sup>88</sup> If we hope to reach such persons, and to arrive at mutually attractive sustainable results, our best bet involves recourse to metaethical objectivity.

#### IV. CONCLUSION

Thus, in sum, it seems reasonable to concede that no otherwise plausible natural law theory is useful in constitutional interpretation, as the multiple indeterminacies of such a natural law theory are substantial, and in fact leave it at a disadvantage in comparison with non-natural law-based alternatives. There is, however, a deeper sense in which natural law theory in constitutional and other contexts is indispensable, despite its practical indeterminacy. To abandon the pursuit of objectivity in the constitutional realm, and presumably elsewhere, would reasonably predictably tend over time to otherwise avoidably promote forms of society that most of us, regardless of ideology, would today find distinctly unattractive.<sup>89</sup>

It remains, finally, to discuss the mutual consistency of our two major theses, that of the special and substantial indeterminacy of natural law adjudication, and the distinctive moral value of some, but hardly all, varieties of moral objectivism in adjudication and elsewhere.

It is tempting, and perhaps even correct, to assume that there is a serious tension between these two theses. Perhaps, to take an extreme case, we can imagine a world in which judges could readily discern unique objectively morally best answers to all relevant legal issues, and would rule in accordance with such answers, at least in the

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88. GEORGE P. FLETCHER, *LOYALTY: AN ESSAY ON THE MORALITY OF RELATIONSHIPS* 174 (1993). This sentence is extracted from a more extended argument by Professor Fletcher that is remarkable for its concision, judgment, and eloquence.

89. For a statement of at least roughly this thesis, but with fewer footnotes, see Steven D. Smith, *Book Review of Natural Law Theory: Contemporary Essays*, 10 CONST. COMMENT. 489, 495 (1993).

absence of special circumstances. Wouldn't such a jurisprudential regime be morally preferable to our current circumstances, marked typically by judicial floundering, groping, backtracking, myopia, arbitrariness, and indeterminacy?

Actually, that is not so obvious. It would not be difficult to argue that even if we assume that morally objectivist jurisprudence should recognize the objective moral values of pluralism, diversity, and tolerance, a world with one readily determined best answer to all moral and jurisprudential questions would verge on self-contradiction, in that it would tend to degrade, diminish, and impair the dignity of the human personality. If all of our choices arrived with the best resolution plainly and inescapably inscribed thereon, the worth of the conscientious moral decisionmaker, aspiring to moral progress and moral responsibility, would be in a crucial respect undermined. Beyond some point, then, reducing indeterminacy tends paradoxically to reduce objective moral value in the world.

This is not to suggest, however, that maximizing indeterminacy tends to maximize objective moral value.<sup>90</sup> If no possible answer is objectively any better than any other possible answer, or if we cannot in principle recognize any such answers, our choices and our freedom and ability to choose are equally devoid of objective value and moral seriousness.

The middle ground, one of various sorts of quite substantial indeterminacies, is thus a natural home for the pursuit, and at least occasional tentative or partial grasp, of some degree of moral objectivity. Despite the indeterminacies the judiciary faces, we can reasonably detect objective moral differences between imprisoning Oskar Schindler for violation of Nazi edicts<sup>91</sup> or not jeopardizing Schindler's rescue efforts, between slavery and manumission, and between a typical child's voluntarily or involuntarily plugging permanently into a delusive "experience machine"<sup>92</sup> in contrast to living a reasonably normal, productive life.

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90. Compare the irredeemably paradoxical assertion of Roberto Unger that recognizably objectively true moral principles devalue and trivialize the value of the choosing human personality. See ROBERTO M. UNGER, *KNOWLEDGE AND POLITICS* 77 (1975).

91. See KENEALLY, *supra* note 84, at 109-15. But cf. Steven F. Sapontzis, *Groundwork for a Subjective Theory of Ethics*, 27 AM. PHIL. Q. 27, 35 (1990) (Nazism as "both historically true, because its principles continue to define contexts of ethical discussion and determination, and contextually false, because its principles are inconsistent with those of our ethical tradition").

92. See ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 42-45 (1974). See also the works of Robert Kane, *supra* note 84.



No doubt each of these examples could be controverted. No doubt our sense of what morality requires or permits in such cases has changed historically. No doubt improvement of our moral grasp of such cases in the future is possible. We should be richly conscious of our fallibility and our frequently demonstrated capacity for barbarism and intolerance in the name of objectivity. But none of these considerations undermines either the continuing pursuit of some degree of objectivity or the compatibility of such objectivity with judicial indeterminacy. If any opponent of objectivity is troubled by the lack of popular consensus on many crucial moral issues, let us remember that objectivity does not imply consensus, that continuing conflicts in basic interests among persons remains an imposing obstacle to increased moral consensus, and that real or apparent conflict in basic interests is itself compatible with some degree of objectivity in moral decisionmaking.

